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No. 82-664

In The

Supreme Court of the United States

October Term, 1982

GEORGE L. KARAPINKA,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly dismissed petitioner's appeal on the grounds that it was taken from a non-appealable order.

2. Whether the Court of Appeals was in error in allowing a supplemental appendix to be filed and in refusing to hear oral argument on the appeal.

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OPINIONS BELOW

Respondent respectfully submits that the opinions below are adequately identified in the petition.

JURISDICTION

Respondent respectfully submits that the facts relating to this Court's jurisdiction are adequately set forth in the petition.

STATUTORY PROVISIONS AND RULES

Statutes

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2, *et seq.*, provides in relevant part:

> Employer practices
>
> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Judicial Code and Judiciary Act, 28 U.S.C. §1291 states:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts

of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

The Judicial Code and Judiciary Act, 28 U.S.C. §1292 states:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rules

Fed. R. App. P. 30(a) and (b) states:

(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of

the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts. . . .

(b) Determination of Contents of Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. . . .

Rule 10(3) of the Rules of the Court of Appeals for the Third Circuit provides:

Contents of Appendix. As required by Rule 30(a), Federal Rules of Appellate Procedure, the appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket

entries in the proceeding below; (2) any relevant portions of the pleadings, charge, or findings; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. In addition, the appendix shall contain: (5) a table of contents with page references; (6) the notice of appeal and (7) the memorandum or opinion of any trial court subject to review. . . .

Rule 12(6)(a) of the Rules of the Court of Appeals for the Third Circuit provides:

(6) Oral argument.

(a) Oral argument shall be allowed in all cases unless the panel, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed.

Any party to the appeal shall have the right to file a statement with the Court setting forth the reasons why, in his opinion, oral argument shall be heard. Such statement shall be filed with the Clerk within seven (7) days after the filing of appellee's or respondent's brief. The request shall set forth the amount of argument time required.

Criteria for determining whether there should or should not be oral argument are:

(1) whether the appeal is frivolous; or

> (2) whether the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) whether the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Local Rule 13B of the United States District Court for the District of New Jersey provides:

> The time within which to answer or reply may, before its first expiration and with or without notice, be extended once for not to exceed fifteen days on order granted by the clerk. Any other extension of time must be approved by the court.

STATEMENT OF THE CASE

Petitioner George L. Karapinka ("Karapinka") seeks to have this Court review the dismissal of his appeal by the Court of Appeals for the Third Circuit, which dismissal was based upon the finding that the appeal was taken from a non-appealable order. Within the guise of this petition for a writ of certiorari, petitioner also seeks to have this Court review numerous discretionary actions taken by the District Court for the District of New Jersey in proceedings below.[1] Defendant-respondent Union Carbide

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1. The district court's actions which Karapinka incorrectly challenges in his petition include the district court's refusal to enter summary judgment in his favor (although a motion for summary judgment was never made by Karapinka) (Petition, pp. 8-10), and the district court's decision to allow the case to proceed before it notwithstanding the filing of Karapinka's appeal to the Court of Appeals (Petition, pp. 11-13).

Corporation ("Union Carbide") believes it unnecessary to address the issues raised concerning the district court's actions as they were not the subject of review by the Court of Appeals and accordingly are improperly raised by Karapinka in this petition for a writ of certiorari.

The complaint in this matter was filed on May 6, 1981, with service effected on Union Carbide on June 12, 1981. The complaint alleges that Karapinka was discharged from employment by Union Carbide in 1971 (some ten years previously) on the basis of his national origin (Ukrainian) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (A-1).[2]

On July 17, 1981 (after receiving an extension from the district court pursuant to its Local Rule 13B) Union Carbide filed a Motion to Dismiss or for Summary Judgment (in lieu of an answer), with a supporting brief and affidavit (A-12, A-13, A-17). Karapinka then served a brief in opposition to Union Carbide's motion along with his affidavit (A-27, A-31). Subsequent to the filing of the brief in opposition, Karapinka also filed a "Motion to Dismiss the Defendant's Motion" (A-42).

On September 22, 1981, Union Carbide's attorneys notified the district court that it would withdraw its motion to dismiss and would serve its answer to the complaint by October 2, 1981 (10 days therefrom; *see* A-48, A-49). The district court confirmed the withdrawal of Union Carbide's motion to the parties in writing

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2. All "SA" references are to the Supplemental Appendix submitted to the Court of Appeals by Union Carbide. All "A" references are to Karapinka's Appendix filed with his brief on appeal in the Court of Appeals. Both appendices were designated by Karapinka to be certified and transmitted to this Court by the Court of Appeals as part of the record below. All "PA" references are to Karapinka's appendix included with the petition.

and stated that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A-44).

On October 2, 1981, Union Carbide served its answer to the complaint, which was filed on October 5, 1981 (SA-6).

Karapinka served a motion for judgment by default on September 24, 1981. That motion was scheduled to be heard on October 19, 1981.

On October 5, 1981, Karapinka filed an amendment to his motion to dismiss Union Carbide's motion (previously declared moot by the district court) seeking expenses allegedly incurred in responding to that motion (A-52).

Also on October 5, 1981, the district court stated on the record that Union Carbide's motion for summary judgment had been withdrawn and that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A-66).

Karapinka's motion for judgment by default was heard and decided on October 19, 1981 (A-67). The district court denied that motion.

The order denying Karapinka's motion for judgment by default was signed by Judge Debevoise on October 21, 1981, but was not filed until November 2, 1981 (SA-15). On October 26, 1981, Karapinka served a motion for reargument concerning the October 19, 1981 hearing (A-60). In his motion papers Karapinka complained that the proposed order did not mention Union Carbide's motion to dismiss (which had previously been withdrawn). Additionally, he stated that his brief and affidavit in response to Union Carbide's withdrawn motion to dismiss contained "counterclaims" for summary judgment in his favor and asked the district court to consider these "counterclaims".

Union Carbide opposed the motion for reargument (SA-17). The district court, in a letter to the parties, and by order dated November 5, 1981, denied Karapinka's motion for reargument (SA-21, SA-22), and also amended the order filed November 2, 1981, including therein denial of Karapinka's "motion" for summary judgment (SA-22).

Karapinka filed his notice of appeal to the Court of Appeals on October 30, 1981 (A-64). The appeal was taken from the district court's order denying Karapinka's motion for judgment by default, and the decision of the district court allowing Union Carbide to withdraw its motion to dismiss.

Subsequent to the parties being notified that the appeal would be heard without oral argument, Karapinka filed a motion for oral argument. By order of the Court of Appeals dated June 24, 1982, this motion was denied.

By order dated June 25, 1982, the Court of Appeals properly determined that Karapinka's appeal was from a non-appealable order and accordingly dismissed the appeal (PA-1).[3]

By order dated July 21, 1982, the Court of Appeals denied Karapinka's petition for rehearing.

On August 5, 1982, Karapinka served a motion in the Court of Appeals seeking the opinion on which the order dismissing his appeal was based. By order dated August 23, 1982, that motion was denied on the grounds that the Court rendered its decision without an opinion (PA-2, PA-3).

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3. By the same order, the Court of Appeals granted Union Carbide's motion to file a supplemental appendix which contained, *inter alia*, the relevant docket entries in the district court and the order and amended order from which Karapinka was appealing.

SUMMARY OF ARGUMENT

Karapinka has failed to identify issues of law which would, under Sup. Ct. Rule 17, justify the grant of a writ of certiorari. Rather, his petition seeks to have this Court create exceptions to well established principles which the Court of Appeals applied in dismissing his appeal.

ARGUMENT

I.

The Court of Appeals properly dismissed petitioner's appeal for want of an appealable order.

The Court of Appeals, in its order dated June 25, 1982, dismissed Karapinka's appeal for want of an appealable order. Karapinka now claims both that the Court of Appeals incorrectly decided that his appeal was improper, and that it deprived him of summary judgment. As set forth below, the Court of Appeals acted properly and in accordance with clearly established precedent in finding that the appeal was taken from a non-appealable order.

The Courts of Appeals have jurisdiction over final decisions of the district courts of the United States, 28 U.S.C. §1291, and over those interlocutory decisions of the district courts as enumerated in 28 U.S.C. §1292(a) and (b). Karapinka filed an appeal from decisions of the district court allowing the withdrawal of Union Carbide's motion to dismiss and denying Karapinka's motion for judgment by default (A-64). Neither of these decisions is a final decision within the meaning of 28 U.S.C. §1291. These decisions are not encompassed within any provision under 28 U.S.C. §1292(a), nor have the requirements of 28 U.S.C. §1292(b)

been met. Accordingly, the Court of Appeals did not have jurisdiction to entertain this appeal.[4]

Karapinka, in his appeal to the Court of Appeals, appeared to be contesting Union Carbide's withdrawal of its motion to dismiss and the district court's failure to grant summary judgment in his favor. These decisions, which were not dispositive of the merits of the cause of action nor any other issues, do not fall within the definition of a final decision under 28 U.S.C. §1291.

Withdrawal of a motion to dismiss or for summary judgment has the same effect as a denial of that motion, in that it does not dispose of any issues in a case. Rather, it allows the case to go forward on the merits. An order d[illegible]ng a motion to dismiss is not a final decision from which an appeal may be taken. *Fleming v. Berardi,* 441 F. 2d 732 (3d Cir. 1971) (per curiam); *see Catlin v. United States,* 324 U.S. 229, 236 (1945).

Similarly, a denial of summary judgment is not a final appealable order. *Morgenstern Chemical Co. v. Schering Corp.,* 181 F. 2d 160, 161 (3d Cir. 1950); *see Switzerland Cheese Association, Inc. v. Horne's Market Inc.,* 385 U.S. 23 (1966). Therefore, a decision of the district court allowing a party to withdraw a motion to dismiss or for summary judgment, or the district court's failure to grant summary judgment to a party, are not final appealable decisions over which the Court of Appeals has jurisdiction. The Court of Appeals properly recognized this in its order dated June 25, 1982.[5]

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4. In the petition for a writ of certiorari, Karapinka concedes (contrary to his position taken on appeal) that the denial of a motion for judgment by default is not an appealable order. Accordingly, he is not contesting that aspect of the Court of Appeals' decision (Petition, p. 4).

5. Karapinka incorrectly relies on *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1948) and *Gillespie v. United States Steel Corp.,* 379 U.S.

(Cont'd)

Karapinka's appeal did not fall within the range of interlocutory decisions over which the Court of Appeals has jurisdiction as enumerated in 28 U.S.C. §1292(a). Furthermore, 28 U.S.C. §1292(b) allows for review of interlocutory decisions in the discretion of both the district court and the Court of Appeals. The district court never certified the issues in Karapinka's appeal. Indeed, the district court stated that the orders from which Karapinka was appealing were manifestly not appealable orders (SA-24).

Since the decisions from which Karapinka appea'ed were not final decisions within the meaning of 28 U.S.C. §1291, nor appealable interlocutory decisions under 28 U.S.C. §1292(a) and (b), Union Carbide submits that the Court of Appeals properly decided that it did not have jurisdiction over Karapinka's appeal.

Having properly decided that it lacked jurisdiction to entertain the appeal, the Court of Appeals entered an order dismissing the appeal. Under these circumstances, the Court of Appeals could not have granted Karapinka summary judgment to which he claims he is entitled. Accordingly, Karapinka's claim that the Court of

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(Cont'd)
148 (1964) (Petition, pp. 10-12). Neither *Cohen* nor *Gillespie* dealt with the withdrawal or denial of motions to dismiss or for summary judgment. In *Cohen* the Court recognized the appealability of an order dealing with the posting of security pending litigation, stating:

> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

337 U.S. at 546-47. In *Gillespie*, the Court ruled that the striking of certain substantive legal claims was final and therefore appealable under 28 U.S.C. §1291. Here, the orders from which Karapinka sought to appeal were not collateral, nor did they dispose of substantive claims.

Appeals denied him his right to summary judgment is without foundation.

II.

The Court of Appeals proceeded properly in the action below.

In Point II of his petition, Karapinka challenges that portion of the Court of Appeals' order which allowed Union Carbide to file its supplemental appendix. He also contests the Court of Appeals' denial of his motion for oral argument on the appeal. Neither of these issues provides the basis for the grant of a writ of certiorari.

Union Carbide made a motion to file a supplemental appendix after Karapinka refused Union Carbide's request [made pursuant to Federal Rule of Appellate Procedure 30(b)] to include certain items in his proposed appendix. That supplemental appendix included, among other items, the relevant docket entries in the proceeding below, and the order and amended order from which Karapinka was appealing. These items are required to be contained in the appendix under Rule 30(a) of the Federal Rules of Appellate Procedure and Rule 10(3) of the Rules of the United States Court of Appeals for the Third Circuit.

The additional items, only some of which were filed with the district court subsequent to the date Karapinka filed his notice of appeal, were all relevant to the appeal. Given the relevance of these items to the issues brought before the Court of Appeals, there can be no error in the Court of Appeals allowing the supplemental appendix to be filed.

With regard to Karapinka's final argument concerning the Court of Appeals' denial of his motion for oral argument, it need only be stated that it is in the discretion of the Court of Appeals

to grant or deny oral argument. The Court of Appeals, acting pursuant to Rule 12(6)(a) of the Rules of the United States Court of Appeals for the Third Circuit, determined that oral argument was not needed in this case. Nevertheless, Karapinka filed a motion for oral argument which was denied by the Court. In exercising its discretion, the Court of Appeals acted in accordance with the accepted and usual course of judicial proceedings. That Karapinka was unhappy with the result does not provide the basis for a grant of a writ of certiorari.

CONCLUSION

For all the foregoing reasons, respondent Union Carbide Corporation respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following is a listing naming all subsidiaries (except wholly-owned subsidiaries), and affiliates of Respondent Union Carbide Corporation: Arizona Welding Equipment Co.; Bayox Inc.; Colombia Welding Products, Inc.; Miami Welding Supply, Inc.; ACM Services, Inc.; Carbographite Limited; Chrome Corporation (South Africa) (Proprietary) Limited; Elektrode Maatskapy Van Suid Africa (Eiendoms) Beperk; Zimbabwe Mining and Smelting Company (Private) Limited; Karaj Road Property Company Limited; Ucar Plastics (Ghana) Limited; Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Yemen Ltd. ; Carbide Hashim Industrial Gas Company; Tubatse Ferrochrome (Proprietary) Limited; P.T. Agrocarb Indonesia; Chemos Indsustries Pty. Limited; Delvan Pty. Limited; Joint Industries (HYCEL) 1970 Limited; P.T. Karmi Arafura Fisheries; Nippon Unicar Company Limited; Sony-

Eveready Inc.; Union Carbide Australia & New Zealand Limited; Union Carbide Australia Limited; Union Carbide Ceylon Limited; Union Carbide Formosa Co., Ltd.; Union Carbide India Limited; Union Carbide Malaysia Sdn. Bhd.; Union Carbide New Zealand Limited; Union Gas Company Limited; Union Polymers Sdn. Bhd.; Union Showa K.K.; Nepal Battery Company, Ltd.; Dai Nippon Jushi Company Ltd.; Eveready Hong Kong Company; Sankyo Plastics Company Limited; Wako Jushi Company Limited; Argon, S.A.; Calida Gas B.V.; Indugas N.V.; La Littorale S.A.; Skandinaviska Polypropane A/B; Unifos Chimie France; Unifos G.m.b.H.; Unifos Kemi A/B; Unifos Kemi A/S; Unifos Kemi Norsk A/S; Unifos U.K. Limited; Union Carbide France, S.A.; Union Carbide Iberica, S.A.; Compania Navarra del Oxigeno S.A.; Oxigeno Del Norte, S.A.; Oy Unifos A.B.; Societe Civile des Produits Lifine; Eletro Manganes Ltda.; Eletrometalurgica Saudade Ltda.; Oxigenio Edy S.A.; Union Carbide Argentina, S.A.I.C.S.; Sociedad Anonima White Martins; S.A. White Martins Nordeste; Celbras-Emprese Brasileira de Cilindros Limitada; Incarmex, S.A. de C.V.; Nitropet, S.A.; Servicios DYC, S.A. de C.V.; Unicarb Industrial, S.A. de C.V.; Union Carbide Mexicana, S.A.; Administracion y Servicios Carmex, S.A. de C.V.; Servicios Administrativos Carmex, S.A. de C.V.; Niject Services Company; Welnite Company; Petromont and Company Limited; Eveready Hong Kong Company.